MIL v. MON & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
EVROL MARIETTE PETERS J
[ORIGINATING SUMMONS NOS: WA-24F-21-01-2019
& WA-24F-280-09-2023]
28 FEBRUARY 2024

Abstract – *(i) In assessing a variation application to vary a court order seeking guardianship of a child and a custody application for a child, it is imperative to take into account the welfare of the child which is the 'golden thread' throughout the proceedings. The demise of one parent alone does not warrant granting guardianship as well as custody, care and control of a child to the surviving parent. There is a necessity to apply legal principles governing family proceedings in determining whether a surviving parent should be granted guardianship. To reach a well informed decision, the court has to meticulously examine the notion of the 'welfare of the child' in its most expansive context, considering all pertinent factors and judiciously balance them.*

FAMILY LAW: *Children – Child out of wedlock – Application for variation – Application to vary court order seeking guardianship, custody, care, and control of child – Whether variation application procedurally flawed – Whether court functus officio – Whether demise of one parent warranted granting guardianship and custody to surviving parent – Consideration of child's welfare – Whether there existed material changes in circumstances to justify allowing variation application*

FAMILY LAW: *Children – Child out of wedlock – Application for custody of child by child's half sister – Whether demise of one parent warranted granting guardianship and custody to surviving parent – Consideration of child's welfare – Whether half-sister possessed financial resources to adequately support child – Whether half-sister played significant role in child's development – Whether granting custody application aligned with best interests and welfare of child*

The focal point of contention herein revolved around a child born out of wedlock. Both the child's biological mother, MON, and half-sister, GEL, had filed respective applications to this court, each seeking guardianship, as well as custody, care and control of the child. The applicant in OS No 21 was MIL, the father of three children born from his marriage to one Madam Ong. The three children were a 36-year-old daughter ('GEL') and two sons, aged 33 and 26 respectively ('siblings'). GEL was the applicant in OS No 280. The narrative began in 2010, when MIL and his then-personal assistant, MON, commenced a romantic relationship. At that time, MIL was separated from Madam Ong. Subsequently, MIL and MON began cohabiting and in January 2012 they welcomed a daughter ('the child') into their lives. In

2013, MIL purchased a two-storey semi-detached house ('family home'). MIL, along with MON, the child, GEL and the siblings, relocated to the family home. They cohabited in the family home until December 2018, at which point MON departed from the household. Numerous applications were then filed by both MIL and MON, each outlining their claims and concerns. On 29 January 2019, MIL filed an application seeking guardianship, custody, care and control of the child, rooted in the contention that MON had left the family home, having abandoned the child. In response, MON filed a similar application under OS NO 27 and secured interim custody, care and control of the child through an *ex parte* application. However, MIL successfully applied to set aside that interim order, resulting in the child's return to the family home on 14 February 2019. Ultimately, the court issued a comprehensive order on 29 April 2019 ('court order') granting MIL both guardianship and custody, along with care and control of the child. In June 2022, following MIL's death, his wife Madam Ong, assumed the role of administratrix of MIL's estate ('administratrix'). The child continued to reside at the family home under the care of GEL and the siblings. A year later, in June 2023, MON filed an application to vary the court order ('variation application') seeking guardianship, as well as custody, care, and control of the child. Subsequently, GEL filed an application also for guardianship, custody, care and control of the child ('custody application'). The issues that arose were (i) whether the variation application was procedurally flawed; (ii) whether this court was *functus officio* with regard to the variation application; (iii) whether there was material change in circumstances; (iv) consideration of child's welfare; and (v) whether the child should have been interviewed.

Held (dismissing variation application; allowing custody application):

(1) Procedural objections raised by counsel for GEL was based on perceived flaws in the variation application. The argument posited that, considering MIL's demise, who originally initiated OS No 21, MON should have sought a substitution of MIL with the administratrix. However, this argument was untenable, given that the administratrix had responded to the notice of application by confirming in an affidavit tambahan that the administratrix had granted and authorised GEL to file an affidavit-in-reply to MON's affidavit in support of the variation application. This by itself was indicative that the administratrix had submitted to the jurisdiction of this court. As such, it was necessary to dismiss this objection. (paras 17-20)

(2) In family proceedings, an application to vary is permissible under s. 96 of the Law Reform (Marriage and Divorce) Act 1976 ('LRA') which applies specifically to family proceedings where an interested party is allowed, at any time, and from time to time, to apply for variation of court orders pertaining to spousal and child maintenance, as well as

child custody. Other provisions applicable to variation applications in family proceedings are ss. 83, 84 and 97 of the LRA. MON, therefore, was at liberty to file the variation application. (paras 23-25)

(3) In examining the question of material change in circumstances, the inquiry was not simply whether there has been any material change *per se* since the court order was granted. The change must be sufficiently material, such that expecting the *status quo* to remain would not be justified. In the present case, MON argued that the demise of MIL alone warranted granting guardianship as well as custody, care and control to her as the surviving parent. However, s. 6 of the Guardianship of Infants Act 1961 ('Guardianship Act') does not inherently trigger an automatic reversion of guardianship to MON. The inclusion of the phrase 'subject to this Act' within the section underscores that the court must examine the facts and circumstances of each case. It necessitates an application of legal principles governing family proceedings in determining whether MON should be granted guardianship of the child. In fact, s. 11 of the Guardianship Act explicitly mandates the court to prioritise the welfare of the child in its deliberations. (paras 30-35)

(4) The mere demise of MIL did not constitute a material change in circumstances. The child had consistently resided with MIL, GEL and the siblings, receiving care from both MIL and subsequently GEL. GEL continued providing financially for the child's needs following MIL's demise. The child had also been included among the beneficiaries of MIL. Even if the child was excluded from MIL's list of beneficiaries, that fact alone did not constitute a material change in circumstances or even suggest a compromise in the child's welfare. On the contrary, it was GEL who had consistently covered the child's expenses since MIL's passing, while MON failed to provide any evidence of her contributions. GEL had prioritised the child's welfare and interests, demonstrated by, *inter alia*, the proactive step of even securing an insurance savings policy for the child's future. (paras 38-41)

(5) In assessing both the variation application and custody application, it was imperative to take into account the welfare of the child, which was the 'golden thread' throughout these proceedings. To reach a well-informed decision, this court had to meticulously examine the notion of the 'welfare of the child' in its most expansive context, considering all pertinent factors and judiciously balance them. Herein, GEL had possessed the financial resources to adequately support the child. In contrast, MON, a single mother, failed to disclose her monthly salary and employment details. There was a high probability that MON lacked the financial means to maintain the child's accustomed lifestyle provided by GEL. Furthermore, the child's consistent presence in the family home, highlighted the significant role GEL played in the child's

physical, emotional and mental development. It was undeniable that the child remained dependent on GEL. The child's current environment was therefore satisfactory. This court had to prioritise ensuring a secure, sanitised and safe environment for the child's upbringing. MON, however, had failed to demonstrate her ability to provide such an environment for the child. (paras 42-50)

(6) MON had allegedly coerced the child into fabricating a false police report, accusing MIL of molesting the child, leading to MIL's police detention. This grave accusation prompted comprehensive medical and psychological examinations of the child, who later confessed to lying about the alleged molestation. The child openly admitted to the presiding judge that she had been influenced by MON to make false accusations, to bolster MON's custody battle with MIL. This narrative raised serious concerns, especially considering the gravity of sexual abuse allegations in matrimonial proceedings. It shed light on MON's willingness to manipulate the child and resort to extreme measures, even at the expense of someone's reputation, to achieve her objectives. Such behaviour painted a troubling picture of MON's character and underscored the potential repercussion of her actions on custodial matters. Thus, there existed no material change in circumstances to justify allowing MON's variation application. Conversely, GEL's custody application was granted, as it aligned with the best interests and welfare of the child. (paras 52, 53, 54 & 61)

(7) Judges are not obligated to conduct interviews with children. Opting not to interview children is a decision that may be deemed appropriate, as its efficacy often hinges on the unique circumstances of each case. It was crucial to acknowledge the inherent constraints of this approach and exercise prudence, recognising that valuable insights may also be gleaned from the parents of the child, and even their solicitors. These alternative avenues provide judges with comprehensive information, alleviating any apprehensions about inadvertently involving children in the complexities of contentious legal proceedings through direct interviews. In this case, MON had a tendency to coach the child and encourage dishonesty. This played a crucial role in this court's deliberation regarding whether to interview the child. Thus, this court opted against conducting an interview. The evidence presented by both MON and GEL, provided ample grounds for this court to make a well-informed decision concerning the child's welfare. (paras 57-60)

Case(s) referred to:

Ahmad Saidi Md Isa v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors [2006] 1 CLJ 977 CA ***(refd)***

Anna Tay Siew Hong v. Joseph Ng Tiong Yong [1995] 3 CLJ 717 HC ***(refd)***

Gisela Gertrud Abe v. Tan Wee Kiat [1985] CLJU 124; [1985] 1 LNS 124 HC ***(refd)***

Lim Hong Bee v. Mah Teck Oon [2010] 8 CLJ 473 HC ***(refd)***

Mahabir Prasad v. Pushpa Mahabir Prasad [1981] CLJ 174B; [1981] CLJ (Rep) 182 HC ***(refd)***
Navarajan Subramaniam v. Rajeswary Muniandy [2019] CLJU 1014; [2019] 1 LNS 1014 HC ***(refd)***
Ng Say Chuan v. Lim Szu Ling [2010] 10 CLJ 371 HC ***(refd)***
Sean O'Casey Patterson v. Chan Hoong Poh & Ors [2011] 3 CLJ 722 FC ***(refd)***
Sivajothi K Suppiah v. Kunathasan Chelliah [2006] 5 CLJ 318 HC ***(refd)***
Tan Erh Ling v. Ong Khong Wooi [2021] CLJU 1325; [2021] 1 LNS 1325 HC ***(refd)***
Tan Sherry v. Soo Sheng Fatt [2016] CLJU 1586; [2016] 1 LNS 1586 HC ***(refd)***
Tan Siew Kee v. Chua Ah Boey [1987] CLJU 77; [1987] 1 LNS 77 ***(refd)***
Teh Eng Kim v. Yew Peng Siong [1977] CLJU 138; [1977] 1 LNS 138 FC ***(refd)***
Thye Ah Chai v. Teraju Mercu Construction & Engineering Sdn Bhd [2013] CLJU 312; [2013] 1 LNS 312 CA ***(refd)***
WKN v. WKN [2024] SGCA 1 ***(refd)***
YCC v. LSY [2007] 7 CLJ 207 HC ***(refd)***

Legislation referred to:
Guardianship of Infants Act 1961, ss. 6, 11
Law Reform (Marriage and Divorce) Act 1976, ss. 83, 84, 88(2)(b), 96, 97
Rules of Court 2012, O. 15 r. 7, O. 42 r. 13

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JUDGMENT

Evrol Mariette Peters J:

Introduction

[1] Two applications were addressed in this judgment. The application in Originating Summons No: WA-24F-21-01-2019 ("OS No 21") was filed by the respondent in encl. 22 to vary the court order dated 29 April 2019; whilst the application in Originating Summons No: WA-24F-280-09-2023 ("OS No 280") was filed by the applicant. Both applications centred on guardianship, as well as custody, care, and control of the child in question.

[2] Since the issues in both applications were common and intertwined, an order to consolidate them was granted by this court in November 2023.

[3] Given the privacy of parties and sensitivity of issues in these proceedings, the applicants, in OS Nos 21 and 280 have been anonymised in these grounds of judgment as MIL and GEL respectively, whilst the respondent and child in question have been anonymised as MON and NAN respectively.

A **The Factual Background**

[4] In summary, the focal point of contention revolved around a child born out of wedlock. Both the child's biological mother, MON, and half-sister, GEL, had filed respective applications to this court, each seeking guardianship, as well as custody, care, and control of the child.

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[5] The applicant in OS No 21 was MIL, the father of three children born from his marriage to one Madam Ong. The three children are a 36-year-old daughter ("GEL"), and two sons, aged 33 and 26, respectively (collectively "the siblings"). GEL is the applicant in OS No 280.

C **[6]** The narrative began in 2010, when MIL and his then personal assistant, MON, commenced a romantic relationship. At that time, MIL was separated from Madam Ong. Subsequently, MIL and MON began cohabiting, and in January 2012, they welcomed a daughter ("the child") into their lives.

D **[7]** In 2013, MIL purchased a two-storey semi-detached house ("the family home"). MIL, along with MON, the child, GEL, and the siblings, relocated to the family home. They cohabited in the family home until December 2018, at which point MON departed from the household.

E **[8]** Numerous applications were then filed by both MIL and MON, each outlining their claims and concerns. On 29 January 2019, MIL filed an application seeking guardianship, custody, care, and control of the child. This application was rooted in the contention that MON had left the family home, having abandoned the child.

F **[9]** In response, on 31 January 2019, MON filed a similar application under Originating Summons: WA-24F-27-01-2019 (OS No 27). Subsequently, on 4 February 2019, MON secured interim custody, care, and control of the child through an *ex parte* application. However, MIL successfully applied to set aside that interim order, resulting in the child's return to the family home on 14 February 2019.

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[10] Ultimately, as a result of MIL's initial application on 29 January 2019, the court issued a comprehensive order on 29 April 2019 ("the court order"), granting MIL both guardianship and custody, along with care and control of the child.

H **[11]** In June 2022, following MIL's death, his wife, Madam Ong, assumed the role of administratrix of MIL's estate ("the administratrix"). The child continued to reside at the family home under the care of GEL and the siblings.

I **[12]** A year later, in June 2023, MON filed an application to vary the court order ("the variation application") seeking guardianship, as well as custody, care, and control of the child. Subsequently, in September 2023, GEL filed an application also for, guardianship, custody, care, and control of the child ("the custody application").

The Issues

[13] The court first had to address the procedural objections raised by GEL, namely whether the variation application was flawed, and whether this court was *functus officio* after the court order was granted.

[14] On the merits, the issue for consideration in the variation application was to assess whether there existed material change in circumstances, whilst the primary concern in the custody application centred around determining whether granting guardianship, custody, care, and control of the child to GEL was in the best interest of the child's welfare.

[15] This court additionally needed to assess the necessity of conducting an interview with the child.

[16] The variation application was dismissed whilst the custody application was allowed for the following reasons.

Contentions, Evaluation, And Findings

Whether The Variation Application Was Procedurally Flawed

[17] At the outset, procedural objections were raised by counsel for GEL. His contention was based on perceived flaws in the variation application. The argument posited that, considering MIL's demise, who originally initiated OS No 21, MON should have sought a substitution of MIL with the administratrix. In support of this contention, reference was made to O. 15 r. 7 of the Rules of Court 2012 ("Rules of Court"), which reads:

> Order 15 – Causes of action, counterclaims and parties
>
> Rule 7 – Change of parties by reason of death
>
> (1) Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy.
>
> (2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it is necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, **order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first-mentioned party.** An application for an order under this paragraph may be made *ex parte*. (emphasis added)

[18] The counsel for GEL contended that mere service by MON of the notice of application for the variation application and affidavit in support thereof upon the administratrix was insufficient as it did not amount to substitution of the parties.

[19] I found the counsel's argument untenable, given that the administratrix had responded to the notice of application by confirming in an affidavit tambahan dated 27 September 2023, that the administratrix had granted consent and authorisation to GEL to file an affidavit in reply to MON's affidavit in support of the variation application. This by itself was indicative that the administratrix had submitted to the jurisdiction of this court. GEL's affidavit in reply to MON's affidavit in support of the variation application was filed also on 27 September 2023.

[20] As such, while the counsel for GEL may be technically correct regarding procedural matters, I found it necessary to dismiss the objection. The principle of "not being allowed to approbate and reprobate" applied, emphasising that one is not allowed to assert and deny the same position simultaneously, particularly in the context of the variation application.

Whether This Court Was Functus Officio With Regard To The Variation Application

[21] Given that the administratrix had granted consent and authorisation for GEL to file an affidavit in reply to MON's affidavit in support of the variation application, which she eventually did on 27 September 2023, GEL was, therefore, deemed to be the party who opposed the variation application.

[22] GEL contended that, in the absence of either an appeal or an application to set aside the court order, this court had become *functus officio*, and was precluded from entertaining the variation application. GEL attempted to fortify her argument by citing cases, including *Thye Ah Chai v. Teraju Mercu Construction & Engineering Sdn Bhd* [2013] CLJU 312; [2013] 1 LNS 312; [2014] 1 MLJ 422, *Ahmad Saidi Md Isa v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [2006] 1 CLJ 977 MYCA, and invoking O. 42 r. 13 of the Rules of Court, which reads:

> Order 42 – Judgment and orders
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> Rule 13 – Setting aside or varying judgment and orders
>
> Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment **within thirty days after the receipt of the order** or judgment by him. (emphasis added)

[23] I found GEL's contention lacking in merit. In family proceedings, an application to vary is permissible under s. 96 of the Law Reform (Marriage and Divorce) Act 1976 ("Law Reform (Marriage and Divorce) Act"), as expressly stipulated:

Section 96 – Power for court to vary orders for custody or maintenance

The court **may at any time** and from time to time vary, or may rescind, any order for the custody or maintenance of a child **on the application of any interested person,** where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances. (emphasis added)

[24] Section 96 of the Law Reform (Marriage and Divorce) Act applies specifically to family proceedings where an interested party is allowed, at any time, and from time to time, to apply for variation of court orders pertaining to spousal and child maintenance, as well as child custody.

[25] Other provisions applicable to variation applications in family proceedings are ss. 83, 84, and 97 of the Law Reform (Marriage and Divorce) Act. MON, therefore, was at liberty to file the variation application.

Whether There Was Material Change In Circumstances

[26] Having dismissed GEL's procedural objections, the merits of the variation application were addressed.

[27] Pursuant to s. 96 of the Law Reform (Marriage and Divorce) Act, the court may vary an order for custody or maintenance of a child where it is satisfied that there has been any material change in the circumstances.

[28] The phrase "material change" has been emphasised in the case of *Sivajothi K Suppiah v. Kunathasan Chelliah* [2006] 5 CLJ 318; [2006] 3 MLJ 184 to mean not simply any change, as the operative word is 'material'. Such phrase has also been explained by George Seah SCJ in the Supreme Court case of *Gisela Gertrud Abe v. Tan Wee Kiat* [1985] CLJU 124; [1985] 1 LNS 124; [1986] 2 MLJ 297, in the following passage:

In our opinion, when an application is made to the court to vary an existing order for maintenance, **the proper approach is to start from the original order and see what changes financial or otherwise,** have taken place since that date including any changes which the court is required to have regard to under s. 78 of the Act as well as any increase or decrease in the means of either of the parties to the marriage and make adjustments roughly in proportion to the changes, if that is possible. (emphasis added)

[29] Further elaboration of 'material change in circumstances' may be found in *Lim Hong Bee v. Mah Teck Oon* [2010] 8 CLJ 473; [2010] MLJU 264, where it was stated by Suraya Othman J (as she then was) that 'the change in question must be material and not any change. It means a change in a crucial and vital part. In considering whether there has been any "material change" within the meaning of this section, all the relevant circumstances must be taken into account.

[30] Hence, in examining the question of material change in circumstances, the inquiry is not simply whether there has been any material change *per se* since the court order was granted. The change must be sufficiently material, such that expecting the *status quo* to remain would not be justified.

[31] It was also crucial to note that the question of whether there was a material change in circumstances is a question of fact, as decided in the High Court case of *Anna Tay Siew Hong v. Joseph Ng Tiong Yong* [1995] 3 CLJ 717, [1995] MLJU 257. Reference was made also to the case of *Navarajan Subramaniam v. Rajeswary Muniandy* [2019] CLJU 1014; [2019] 1 LNS 1014; [2019] MLJU 715, where it was stated by Hayatul Akmal Abdul Aziz J, in the following passage:

> The legal definition of material change in circumstances is not cast in stone. It is ultimately **dependent upon the facts and circumstances of each case.** No one case is like the other. (emphasis added)

[32] MON, therefore, had the legal burden to prove material change in circumstances on a balance of probabilities: *YCC v. LSY* [2007] 7 CLJ 207; *Ng Say Chuan v. Lim Szu Ling* [2010] 10 CLJ 371.

[33] In the present case, MON argued that the demise of MIL alone warranted granting guardianship, as well as custody, care, and control to her as the surviving parent. MON's argument was based on s. 6 of the Guardianship of Infants Act 1961 ("Guardianship of Infants Act"), which states:

> Section 6 – Rights of surviving parent as to guardianship
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> On the death of a parent of an infant, **the surviving parent, if any, shall, subject to this Act, be guardian to the infant** either alone or jointly with any guardian appointed by the deceased parent, and – (a) if no guardian has been appointed by the deceased parent; or (b) in the event of the death or refusal to act of the guardian or guardians appointed by the deceased parent, the Court may, if it thinks fit, appoint a guardian to act jointly with the surviving parent. (emphasis added)

[34] In my view, s. 6 of the Guardianship of Infants Act did not inherently trigger an automatic reversion of guardianship to MON. The inclusion of the phrase 'subject to this Act' within the section underscores that the court must examine the facts and circumstances of each case. It necessitates an application of legal principles governing family proceedings in determining whether MON should be granted guardianship of the child.

[35] In fact, s. 11 of the Guardianship of Infants Act explicitly mandates the court to prioritise the welfare of the child in its deliberations. This principle serves as the "golden thread" interwoven throughout all proceedings, directly influencing the interests of children. Section 11 of the Guardianship of Infants Act reads:

Section 11 – Matters to be considered

The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily **to the welfare of the infant** and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be. (emphasis added)

[36] Therefore, the court is obliged to take into account both the occurrence of material change in circumstances, and the welfare of the child.

[37] In support of the claim that a material change in circumstances had occurred, MON asserted that the demise of MIL, and the subsequent exclusion of the child as a beneficiary in MIL's estate were pivotal factors. Consequently, MON contended that the exclusion of the child from the list of MIL's beneficiaries was indicative that the welfare of the child had not been prioritised.

[38] I found this line of argument lacking in merit for the following reasons. Firstly, the mere demise of MIL did not constitute a material change in circumstances. The child had consistently resided with MIL, GEL, and the siblings, receiving care from both MIL and, subsequently, GEL. It remained undisputed that GEL continued providing financially for the child's needs following MIL's demise.

[39] Secondly, contrary to MON's assertion, it was undisputed that the child had indeed been included among the beneficiaries of MIL, as evidenced by the application filed in originating summons (*ex parte*) No: WA-31NCvC-2764-08-2022.

[40] Thirdly, it was my view that even if the child was excluded from MIL's list of beneficiaries, that fact alone did not constitute a material change in circumstances or even suggest a compromise in the child's welfare.

[41] On the contrary, it was GEL who had consistently covered the child's expenses since MIL's passing, while MON failed to provide any evidence of her contributions. Notably, GEL had prioritised the child's welfare and interests, demonstrated by, *inter alia*, the proactive step of even securing an insurance savings policy for the child's future.

Consideration Of The Child's Welfare

[42] In assessing both the variation application and custody application, the court found it imperative to take into account the welfare of the child, which, as alluded to earlier, was the "golden thread" throughout these proceedings. This requirement is found not only in the Guardianship of Infants Act, but also in s. 88(2) of the Law Reform (Marriage and Divorce) Act, which reads:

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> Section 88 – Power of court to make order for custody
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> …
>
> (2) In deciding in whose custody a child should be placed **the paramount consideration shall be the welfare of the child** and subject to this the court shall have regard:
>
> (emphasis added)

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[43] At this juncture, it was crucial to have a comprehensive understanding of the term 'welfare of the child,' as extensively referenced in numerous legal precedents including *Teh Eng Kim v. Yew Peng Siong* [1977] CLJU 138; [1977] 1 LNS 138; [1977] 1 MLJ 234, *Mahabir Prasad v. Pushpa Mahabir Prasad* [1981] CLJ 174B; [1981] CLJ (Rep) 182; [1982] 1 MLJ 189, *Tan Sherry v. Soo Sheng Fatt* [2016] CLJU 1586; [2016] 1 LNS 1586, and *Tan Erh Ling v. Ong Khong Wooi* [2021] CLJU 1325; [2021] 1 LNS 1325.

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[44] I was also guided by the Federal Court in *Sean O'Casey Patterson v. Chan Hoong Poh & Ors* [2011] 3 CLJ 722, in its reference to the Singapore case of *Tan Siew Kee v. Chua Ah Boey* [1987] CLJU 77; [1987] 1 LNS 77, wherein the expression 'welfare of the child' was explained by Chan Sek Keong JC (as he then was), in the following passage:

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> The expression 'welfare' … is to be taken in its widest sense. It means the general well-being of the child and all aspects of *his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive* to the attainment of such well-being. It is not to be measured in monetary terms.
>
> (emphasis added)

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[45] The Federal Court in *Sean O'Casey Patterson v. Chan Hoong Poh & Ors* (*supra*), through the opinion of James Foong FCJ, proceeded to explain 'welfare of the child' in the following passage:

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> [53] According to *Halsbury's Laws of England*, 4th edn, reissue (Mackay edition), para 443 the term, "welfare principle" is a set of factors used when "a court determines any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, the child's welfare must be the court's paramount consideration". In the English Children Act 1989, under the heading 'welfare of the child' is a set of factors that must be taken into account when deciding on such cases. **These are for example: the wishes of the child; his feelings; his age; his sex and his background and the capabilities of the parties involved.** Thus, this term "welfare principle" relates to certain factors to be considered and their priority during deliberation in such cases. (emphasis added)

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[46] To reach a well-informed decision, this court had to meticulously examine the notion of the 'welfare of the child' in its most expansive context, considering all pertinent factors and judiciously balance them. Given the distinctive circumstances inherent in each case, offering an exhaustive list of specific considerations is not feasible.

I

[47] It was evident that GEL possessed the financial resources to adequately support the child. In contrast, MON, a single mother responsible for supporting her son from a previous relationship, failed to disclose her monthly salary and employment details. During the hearing of the applications, MON's counsel submitted that her client received a monthly salary of MYR6,000. However, no evidence was adduced to support such averment. This omission raised concerns, as there was a high probability that MON lacked the financial means to maintain the child's accustomed lifestyle provided by GEL.

[48] Furthermore, the child's consistent presence in the family home, except for a brief period when MON obtained custody, highlighted the significant role GEL played in the child's physical, emotional, and mental development. Although MON continued to have access to the child, it was undeniable that the child remained dependent on GEL.

[49] Concerns also extended to the potential impact on the child's environment if the variation application was allowed. Based on the evidence adduced, the child's current environment was satisfactory. She not only had the presence of GEL, she also had the support of the siblings and their family. Doubts, however, arose regarding the suitability of MON's home environment for the child's wellbeing. Unlike GEL, who provided evidence through photographs of her living arrangements, MON failed to demonstrate any arrangements ensuring a comfortable, conducive, and stable living environment for the child. This lack of evidence raised legitimate concerns about the proposed living conditions under MON's care.

[50] GEL further argued that MON led a promiscuous lifestyle, raising concerns about the suitability of such an environment for an 11-year-old girl. While I took the view that this court should not make moral judgments on MON's lifestyle choices, it was crucial to bear in mind that the court's paramount duty was to protect the child's welfare. Hence, this court had to prioritise ensuring a secure, sanitised, and safe environment for the child's upbringing. Regrettably, it was my view that MON had failed to demonstrate her ability to provide such an environment for the child.

[51] MON had also highlighted the impending puberty of the child, asserting that the child would require maternal guidance during this transitional phase, and that MON, being the child's biological mother, averred that she would be the best person to provide such guidance to the child. I had to disagree with this assertion, given that GEL had been a consistent and nurturing mother figure in the child's life, as she had played a significant role in the child's upbringing.

[52] Additionally, attention was drawn to the concerning incident during the proceedings in OS No 27 and OS No 21. MON had allegedly coerced the child into fabricating a false police report, accusing MIL of molesting the child, leading to MIL's police detention on 14 February 2019. This grave

A accusation prompted comprehensive medical and psychological examinations of the child, who later confessed to lying about the alleged molestation. The child openly admitted to the presiding judge that she had been influenced by MON to make false accusations, to bolster MON's custody battle with MIL.

B **[53]** This narrative raised serious concerns, especially considering the gravity of sexual abuse allegations in matrimonial proceedings. While the child's admission ultimately vindicated MIL, the incident shed light on MON's willingness to manipulate the child and resort to extreme measures, even at the expense of someone's reputation, to achieve her objectives. Such C behaviour painted a troubling picture of MON's character and underscored the potential repercussions of her actions on custodial matters.

[54] All these factors stated above fortified my view that the variation application should be dismissed and the custody application allowed.

D *Whether The Child Should Have Been Interviewed*

[55] An issue that this court had to address was whether the child should have been interviewed by the judge, as requested by MON. I decided against it for the following reasons.

E **[56]** In making an order for custody, I am mindful that the court shall have regard to the wishes of the child, pursuant to s. 88(2)(b) of the Law Reform (Marriage & Divorce) Act, which reads:

> Section 88 – Power of court to make order for custody
>
> …
>
> F (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:
>
> (a) to the wishes of the parents of the child; and
>
> G (b) **to the wishes of the child,** where he or she is of an age to express an independent opinion.
>
> … (emphasis added)

[57] Nevertheless, it was important to note that judges are not obligated to conduct interviews with children. Opting not to interview children is a H decision that may be deemed appropriate, as its efficacy often hinges on the unique circumstances of each case. It was crucial to acknowledge the inherent constraints of this approach and exercise prudence, recognising that valuable insights may also be gleaned from the parents of the child, and even their solicitors. These alternative avenues provide judges with I comprehensive information, alleviating any apprehensions about inadvertently involving children in the complexities of contentious legal proceedings through direct interviews.

[58] In the current context, it was important to emphasise that the request for a judicial interview originated from MON, while GEL exhibited clear hesitancy. After having evaluated the case history, it was evident that MON had a tendency, as alluded to earlier, to coach the child and encourage dishonesty. This fact played a crucial role in my deliberation regarding whether to interview the child.

[59] Additionally, the child had already gone through an interview by the previous judge in OS No 27, and it was imperative for this court to exercise caution in not unnecessarily involving the child in the legal complexities. Nonetheless, the evidence presented by both MON and GEL, along with the submissions from their respective counsel, provided ample grounds for this court to make a well-informed decision concerning the child's welfare. In reference to this, I sought guidance from a recent case by the Singapore Court of Appeal, namely *WKN v. WKN* [2024] SGCA 1. In delivering the court's decision, Debbie Ong Siew Ling JAD, underscored the following in her statement:

> [64] The **judicial interview should not become a step where the court takes a snapshot of an emotional position at a particular point in time** and reaches a decision based on that momentary picture. Information obtained through **other sources would enable the court to have a longitudinal view of the history of the case** and a fuller understanding of the family's relationships and issues. (emphasis added)

[60] Similarly, upon delving into the intricacies of the history of this case, and considering the challenges the child had previously encountered, I opted against conducting an interview. Instead, I relied on the ample information already adduced, ensuring a thorough and informed basis for my decision-making process.

Conclusion

[61] In conclusion, after considering the aforementioned arguments and conducting a thorough examination of all the evidence presented to this court, encompassing both written and oral arguments from both parties, I took the view that there existed no material change in circumstances to justify allowing MON's variation application. Conversely, GEL's custody application was granted, as it aligned with the best interests and welfare of the child.